In the Court of Appeals of the State of Alaska

Byron F. Geisinger, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals Nos. **A-12682 & A-12691** **Order** Petition for Rehearing Date of Order: **11/23/2021**

Trial Court Case No. **4FA-11-02842CI**

Before: Allard, Chief Judge, Mannheimer, Senior Judge,[*] and McCrea, District Court Judge.[**]

Byron F. Geisinger seeks rehearing of our decision in his case, *Geisinger v. State*, __ P.3d __, 2021 WL 3235738 (Alaska App. 2021). Although Geisinger raises several claims in his petition for rehearing, we conclude that only one of those claims merits an extended response from this Court.

When we resolved Geisinger's appeal, we decided an issue regarding the proper interpretation of Alaska Professional Conduct Rule 3.3(a)(3). Geisinger claims that he is entitled to rehearing on this issue because this Court raised the issue *sua sponte* and he had no fair opportunity to address it. According to Geisinger, this issue regarding the interpretation of Rule 3.3(a)(3) was never raised during the post-conviction relief litigation in the superior court. In fact, Geisinger's attorney raised this issue during the post-conviction litigation, by affirmatively advancing a mistaken interpretation of

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

[**] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Rule 3.3(a)(3) — and the superior court relied on this mistaken interpretation of the rule when it issued its decision on one of Geisinger's claims for post-conviction relief.

In the superior court, Geisinger contended that his trial attorney, William Spiers, acted incompetently when, at Geisinger's trial, he failed to introduce testimony regarding an exculpatory out-of-court statement that Geisinger made to a witness at the scene of the collision.

This witness, Adam Sagers, testified at grand jury. According to Sagers's grand jury testimony, when he came upon the scene of the collision, he saw a man (later identified as Geisinger) walking away from the scene. Sagers approached Geisinger and said to him, "Hey, where [are] you going? You're hurt; you need to get back over here." — to which Geisinger replied that "he was going to call for help, going to call 911."

Although Sagers testified at Geisinger's trial, Spiers did not ask Sagers to testify about Geisinger's out-of-court statement, even though this statement fell within the hearsay exception for statements describing the speaker's state of mind. See Alaska Evidence Rule 803(3).

During the post-conviction relief litigation, when Spiers was asked why he did not elicit this testimony from Sagers, Spiers said that he consciously chose not to introduce this testimony for two reasons.

First, Spiers concluded that the out-of-court statement would not help Geisinger's defense in any appreciable way, since the uncontroverted evidence showed that Geisinger did not call 911 or take any other steps to seek assistance for the people injured in the collision. Instead, Geisinger hid from the authorities until the next day.

Spiers's second reason for not introducing this evidence was that he "was unwilling to advance a completely false statement of fact ... to the judge and jury in violation of my oath as an Alaska attorney." Spiers explained that, when he interviewed

Geisinger during his preparation of the defense case, Geisinger admitted that he had not left the scene of the collision for the purpose of calling 911, but rather "because he was frightened, because ... he knew he had done something horrible, and [because] he didn't want anybody to come into contact with him, and he didn't want anybody to [administer] a DataMaster or a Breathalyzer [test]. He didn't want anybody to know what his physical condition was."

Although Spiers made no explicit reference to Alaska Professional Conduct Rule 3.3(a)(3), Geisinger's post-conviction relief attorney perceived that this rule was a potential legal justification for Spiers's decision. For this reason, when Geisinger's attorney filed her pleading that attacked Spiers's decision as incompetent, the attorney raised the issue of Professional Conduct Rule 3.3(a)(3), and she argued that this rule did not authorize Spiers to refrain from introducing Sagers's testimony.

Professional Conduct Rule 3.3(a)(3) prohibits lawyers from "offer[ing] evidence that the lawyer *knows* to be false", and the rule also authorizes lawyers to "refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false." The rule further requires a lawyer to take reasonable remedial measures if the lawyer offers evidence and later comes to know of its falsity.

On its face, Rule 3.3(a)(3) speaks of instances where a *lawyer* knows, or reasonable believes, that evidence is false.[1] But in the superior court, Geisinger's

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[1] *See* Ronald D. Rotunda and John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook On Professional Responsibility* (2021–2022 edition, available on Westlaw), § 3.3-4 "The Lawyer's Duties in Offering Evidence to a Tribunal". *See also Akron Bar Ass'n v. Groner*, 963 N.E.2d 149 (Ohio 2012) (holding that, once an attorney learned that a previously submitted background report on a person involved in the litigation contained false statements, the attorney was required to take steps to correct this false information, even though neither

(continued...)

attorney argued that Rule 3.3(a)(3) only applied to instances of *perjury* — *i.e.*, instances where the *witness* giving the testimony knows that the testimony is false.

Relying on this mistakenly narrow interpretation of Rule 3.3(a)(3), Geisinger's attorney argued to the superior court that even if Geisinger's out-of-court statement to Sagers was false (as Spiers believed it to be, based on his conversations with Geisinger), Spiers would not violate any ethical rule if he introduced this false out-of-court statement through Sagers's testimony — because Sagers would be testifying truthfully about what he heard Geisinger say.

The superior court ultimately accepted Geisinger's argument that Spiers lacked any good reason for failing to elicit this testimony from Sagers. In reaching this conclusion, the superior court adopted Geisinger's mistakenly narrow interpretation of Professional Conduct Rule 3.3(a)(3). Specifically, the court stated:

> Mr. Spiers' explanation [for failing to elicit this evidence] is not reasonable. Geisinger's statements [to Sagers] could have been introduced through the testimony of Mr. Sagers because it was a description of Geisinger's then-existing state of mind and/or was an excited utterance, which would avoid both the hearsay problem *and any concern about perjured testimony*. (Emphasis added)

Thus, when this Court decided Geisinger's appeal, in order for us to explain the error in the superior court's decision, we had to discuss the fact that Professional Conduct Rule 3.3(a)(3) applies, not just to perjured testimony, but to all instances where a lawyer either knows or reasonably believes that evidence is false. We did not raise this

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[1] (...continued)
the research firm who prepared the report nor the attorney who submitted it had knowingly misrepresented the facts at the time).

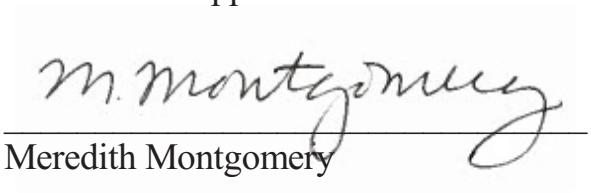
issue *sua sponte*. Rather, we responded to an argument that was raised in Geisinger's trial court pleading and which later was endorsed by the superior court as part of the court's legal basis for its ruling.

We therefore deny Geisinger's request for rehearing of this issue.

With respect to all the other claims raised by Geisinger in his petition for rehearing, rehearing is likewise denied.

Entered at the direction of the Court.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Court of Appeals Judges
Trial Court Clerk
West Publishing for Opinions (Opinion #2707, 7/30/2021)

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